IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SALES TAX REFERENCE No. 8 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG
HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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M/S.D.J. CHEM INDUSTRIES - Applicant(s)
Versus
THE STATE OF GUJARAT - Respondent(s)

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Appearance :
MR TU BHATT AND MR NAYAN A SHETH for Applicant
MR SUNEET S SHAH, GOVERNMENT PLEADER for Opponent

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

and

HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 28/09/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.S.GARG)

1. Gujarat Sales Tax Tribunal, Ahmedabad has made Reference to this Court under Sec.69 of the Gujarat Sales Tax Act, 1969 arising out of Reference Applications No. 28 and 29/94, the question referred to this Court for its opinion is as under:-

> “Whether the tax applicable to the sales made against the certificates in Form-1 prescribed under Entry 118[2] of the Notification would also be required to be taken into consideration for computing aggregation of the tax exemption limit, after discarding the said certificates in Form No.1?”

2. Short facts necessary for disposal of the present matter are that by, Notification issued under Sec.49[2] of the Gujarat Sales Tax Act, 1969 [“the Act” for short], Entry-118 was inserted in the Schedule appended to the Notification. Subject to conditions mentioned therein, sales by a specified manufacturer of

goods manufactured by him were exempted from payment of the whole of the tax during the period specified in the eligibility certificate. Purchases by a specified manufacturer from unregistered dealers, and sales by dealers to the specified manufacturers, of raw material, processing material, consumable stores and packing material were also made exempt. The limit of maximum amount of tax up to which the assessee could claim benefit and the period during which such exemption could be availed of, were determined and certified in his eligibility certificate. In order to control and regulate this part of the scheme, so that an assessee does not avail of more benefit than allowed under the scheme, both as to the tax limit and time-limit, the liability of assessee to tax is required to be determined also for the period during which exemption certificate operates. Entry-118 envisages a general condition that as soon as the aggregate of amounts of tax which would have become leviable from the specified manufacturer but for the exemption under this

entry or under Government Notification No. [GN 12] CST-1081-S. 8[5][32]-TH dated February 5, 1981 issued under sub-section [5] of section 8 of the Central Sales Tax Act, 1956 or under any drawback, set-off or refund during the period commencing on and from June 1, 1980 or as the case may be the date of commissioning the new industry becomes equal to the amount specified in the certificate as the eligible quantum of tax exemption, the exemption would cease.

3. For purposes of operating this condition, all the three turnovers under three sub-entries of Entry-118 have to be subjected to regular assessment as per the provisions of the Act as if Entry-118 does not exist and whatever tax that is assessed on such assessment under each of the sub-entries has to be aggregated and adjusted against the assessee's exemption limit.

4. In the matter of **Ardeec Engineering [Saurashtra] Pvt. Ltd. Vs. State of Gujarat, reported in 2000 Vol. 117 STC 178**, Ardeec Engineering[Saurashtra] Pvt. Ltd., sold certain articles against Forms No.17 and 19 and

recovered less tax. The department wanted to curtail the limit of exemption available to the assessee to the extent of full tax to which the assessee would have been entitled. In absence of Forms No.17 and 19, the assessee objected to the same and ultimately a Reference was made to this Court and was answered by this Court in the above matter. The Division Bench in the matter of Ardeec Engineering [Saurashtra] Pvt.Ltd. [supra] held that, for the purpose of working out exemption available under Entry-118, such sales as are exempted under the provisions of the Act, cannot be treated as taxable and a hypothetical tax liability in respect of such sales assumed to have arisen for purpose of Entry-118. The Court observed that to do this, would be to strain the language used in the Notification and to subject the dealer to tax notwithstanding any other provisions of the Act and notwithstanding any provisions relating to determining taxable turnover of such dealer. The Court further observed that such interpretation of the statute would not be permissible. If the

mode for arriving at the limit has been prescribed to be “as per the tax liability arising for the assessee” in respect of an assessee's turnover or his vendor's turnover as the case may be, the question of determining such liability can only be under the provisions of the Act for regular assessment of such liability and no other. From the Division Bench judgment in the matter of Ardeec Engineering [Saurashtra] Pvt. Ltd. [supra], it would be clear that if a person enters into a transaction of sale and purchase, and even in presence of the scheme as provided under Entry-118, he is entitled to certain exemptions, then, such exemptions would always be available to such dealer and the exemptions which are statutorily available apart from Entry-118 will have to be given to him under the statute and rest of the tax liability will have to be reduced from the benefits of tax exemption liability as available under Entry-118 of the scheme.

5. In the present case, the applicant, who happens to be the specified manufacturer had sold

certain articles to yet another specified manufacturer. While making the purchases, the purchaser submitted Form-1 appended to the scheme declaring, *inter alia*, that the goods were required for use by him within the State of Gujarat as raw materials, processing materials or consumable stores in the manufacture of goods for sale which shall not take place outside the State of Gujarat or as packing material in the packing of the goods so manufactured.

6. On submission of such Form as appended to Entry -118[2], selling dealer or specified manufacturer would not be entitled to recover any tax, because, purchase by other specified manufacturer is exempt from tax liability. If the specified manufacturer is not entitled to recover tax because of the submission of the form, then, tax liability against the selling manufacturer would never arise.

7. The submission of the State Government is that the tax applicable to the sales made against certificate in Form-1 prescribed under Entry-118[2] of the Notification would also be

required to be taken into consideration for computing aggregation of the tax exemption limit after discarding the certificate in Form-1. The submission in fact, is that even if purchasing specified manufacturer is not liable to tax, then too, the liability of the selling specified manufacturer would be to pay the tax. The submission further is that if the liability to pay the tax continues and the tax holiday is enjoyed, then, to the extent of the tax which could be recovered by the selling specified manufacturer, exemption limit should be so reduced. In our considered opinion, the argument would run contrary to the scheme. The scheme provides exemptions in favour of the specified manufacturer which means a person in the State of Gujarat who establishes a new industry after 1st June, 1980 and not after 31st March, 1986 in any of the designated area. It would be necessary to note that such specified manufacturer should also stand certified by the Commissioner of Sales Tax, Gujarat State for issue of necessary certificate specifying the

date on which new industry is commissioned or from the date specified by the Commissioner of Sales Tax in the certificate as may be opted in writing by the person commissioning the new industry. When a specified manufacturer provides Form-1 as provided under Entry-118[2], then, he tells the selling specified manufacturer that as the purchasing specified manufacturer is not liable to tax, the selling specified manufacturer would not be entitled to recover any tax. The exemption virtually is claimed by the purchaser, because, he tells the seller that the seller cannot recover tax because of the scheme. If the purchaser claims exemption or enjoys the tax holiday, then, his limit is required to be curtailed and non-recovery of the tax would not lead to reduction from the tax limit to be enjoyed by the seller.

8. If the argument of the State Government that for purposes of ascertaining the liability of the selling dealer, Form-1 is to be ignored is accepted, then, it would lead to anomalous situation, because, on one side, the exemption

limit of the purchasing dealer would be reduced to the extent of the tax which he saves on submission of Form-1 and at the very same time, the exemption limit of the selling dealer would also be reduced to the extent to which he has not recovered any tax. If tax cannot be recovered by the selling specified manufacturer, then, his exemption limit cannot be reduced. In the matter of Ardeec Engineering [Saurashtra] Pvt. Ltd., the Division Bench was of the opinion that ignoring the scheme as contained in Entry-118, every benefit flowing from the Act itself should be given to the specified selling manufacturer, and thereafter, his liablility should be ascertained and that the net liability should be deducted from the total exemption limit enjoyed by the selling dealer.

9. Undisputedly, Entry-118, which is also known as scheme is a statutory scheme under sub-section [2] of Sec.49 of the Act and, therefore, any benefit flowing in favour of the purchasing dealer has to be given its full effect and any benefit flowing from it in favour of the

selling specified manufacturer should be given to its full extent. The department cannot be allowed to say that though each of the specified manufacturers is entitled to separate limit, but even in one single transaction, limit of both of them would stand curtailed. Under the circumstances, we hold that the tax applicable to the sales made against Form-1 prescribed under Entry-118[2] of the Notification would not be required to be taken into consideration for reducing the tax exemption limit enjoyed by the selling specified purchaser.

10. The Reference is answered in favour of the assessee and against the Department. The Reference stands disposed of. No costs.

[R.S. GARG, J.]

[D.H.WAGHELA, J.]

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